REME COURT. U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 670

FRED BANKS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. EXISTENCE OF JURISDICTION.

As respondent's brief shows, petitioner sought a hearing in the California Supreme Court before he ever came here. Such review was discretionary (*People* v. *Davis* (1950), 147 Cal. 346, 348-349). A hearing was denied. This made the judgment of the Court of Appeal that of the highest state court in which judgment could be had (*Terry* v. *Southern Pacific Co.* (1917), 176 Cal. 584, 584-585; *Amer. Ry. Exp. Co.* v. *Levee* (1923), 263 U.S. 19, 20-21). It also

made the judgment final (*National Bank* v. *Los Angeles etc. Co.* (1906), 2 Cal.App. 659, 663-664; *People* v. *Ruef* (1910), 14 Cal.App. 576, 625, overruled in limited part, not here relevant, *Cothran* v. *San Jose Water Works* (1962), 58 Cal.2d 608, 610-612).

Respondent now contends that petitioner should have gone back to the State Supreme Court, to ask for discretionary review, after each remand. This was unnecessary. He had no right to further review (see *Nash* v. *Florida Industrial Comm'n* (1967), 389 U.S. 235, 237, fn. 1; *Teamsters Local* v. *Lucas Flour Co.* (1962), 369 U.S. 95, 98-101; cf. *Betts* v. *Brady* (1942), 316 U.S. 455, 460-461). It was doubtful the State Supreme Court could have granted review, even had it wanted to (*National Bank* v. *Los Angeles etc. Co.* (1906), 2 Cal.App. 659, 663-664; see also *Stetson* v. *Sheehan* (1921), 186 Cal. 334, 335). Further, what petitioner was seeking after each remand was enforcement of the Court's mandate. For that it was reasonable, and logical, that he come back here, to the Court that issued the mandate (*B. & O. R. Co.* v. *United States* (1929), 279 U.S. 781, 784-785; *In Re Sanford Fork & Tool Co.* (1895), 160 U.S. 247, 255-256). Indeed, his right to do so goes to the very heart of this Court's jurisdiction (*Williams* v. *Bruffy* (1880), 102 U.S. 248, 255-256; *Tyler* v. *Magwire* (1872), 84 U.S. 253, 282-283; see also *Sibbald* v. *United States* (1838), 37 U.S. 487, 491; *United States* v. *du Pont & Co.* (1961), 366 U.S. 316, 325; *Cascade Nat. Gas* v. *El Paso Nat. Gas* (1967), 386 U.S. 129, 136).

The cases cited by respondent do not compel a contrary result. In none of them had petitioner already sought, and exhausted, his option for higher state court discretionary review. And in one, he still had an absolute right to fur-

ther appellate review (*Gorman* v. *Washington Univ.* (1942), 316 U.S. 98, distinguished in *Teamsters Local* v. *Lucas Flour Co.* (1962), 369 U.S. 95, 98-99). None, of course, involved a remand, after a writ of certiorari had already been granted.

Finally, no suggestion was advanced by respondent in the court below that its decision on the first remand, back for review on the second remand, was not that of the highest state court in which a judgment could have been had, or that this Court had lacked jurisdiction to grant certiorari and remand (A. 339). Nor, for that matter, was respondent of the belief the argument had merit here, in view of its failure, or unwillingness, even to suggest the question in its briefs in opposition to the last two petitions for certiorari, or in its more recent motion to dispense with printing the record, filed just last December.

Had there been an obstacle to this Court's jurisdiction, because of a procedural trap in state law, then the right to counsel on remand would have become even more critical. And the issue now would be whether the Sixth Amendment also requires appointment of counsel for state court discretionary review—a question specifically reserved in *Douglas* v. *California* (1963), 372 U.S. 353, 356-357).

B. No Waiver of Fifth Amendment Rights.

No suggestion was ever made by the prosecutor or the trial judge that petitioner had waived his Fifth Amendment rights, through inept questioning or otherwise. Throughout the trial, they treated those rights in full

force and effect, and used them against petitioner, by comment and instruction to the jury on his failure to testify (A. 271, 299, 300, 308-309).

The submission of a handwritten instruction did not give rise to a waiver (Respondent's Brief, p. 34). The court had already told petitioner that it was going to give the instruction, if he did not testify (A. 7). Moreover, the instruction submitted was not the one given by the court, but was covered in another, more damaging instruction taken from somewhere else, which implied that if petitioner had knowledge to deny or explain the evidence, he should have done so (A. 14, 308-309; see italicized portion of instruction, p. 56, Opening Brief).

The isolated comments by petitioner during argument were an expression more of frustration and awkwardness, rather than any deliberate, knowing attempt to testify. Had the fact been otherwise, it would have been incumbent upon the trial judge to warn petitioner that he was in danger of waiving his Fifth Amendment rights (cf. *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 464). But this was never done. Indeed, the prosecutor came right back on closing argument and hammered at petitioner's exercise of those rights, by twice telling the jury that petitioner had not testified (A. 299, 300), and that the jury could take such failure into consideration in reaching a verdict (A. 300-301). Further, this was but a continuation of his tactic on opening argument, where his last, or "clinching" point, was that the defendant had failed to testify (A. 271).

None of the cases cited by respondent support the proposition that there was any waiver of Fifth Amendment rights by petitioner. In fact, one of them shows there was

no waiver, much less any so-called "inducement" for the prosecutor to level his attack (*United States* v. *Curtiss* (2 Cir. 1964), 330 F.2d 278, 281).

Finally, the two decisions below show there was no waiver of Fifth Amendment rights; instead, they show those rights remained intact throughout the trial, and were plainly violated by the instruction and comment on the failure to testify (A. 332-333; 341-342).

C. Retroactivity of Prohibition Against "Adoptive Admissions."

In *Johnson* v. *New Jersey* (1966), 384 U.S. 719, the principal issue was retroactivity of the *Miranda* warnings. Nothing was said of the adoptive admissions to which reference was made in footnote 37 of *Miranda* (384 U.S. 436, 468). *Miranda* itself recognized that the proscription against use of "adoptive admissions" was implicit in this Court's past decisions, and referred specifically to *Griffin*. Moreover, even before *Miranda* was decided, it was held by the California Supreme Court that the rationale of *Griffin* forbade the use of adoptive admissions, in a case like this, as a violation of the accused's privilege against self incrimination (*People* v. *Cockrell* (1965), 63 Cal.2d 659, 669-670, certiorari denied (1967), 389 U.S. 1006). This was logical, because if the right to remain silent meant anything at all, it meant the right to remain silent during custody, as well as at trial.

What *Miranda* does is recognize the principle announced in *Griffin*, that an accused cannot be penalized for asserting Fifth Amendment rights. It is just, therefore, that the rules governing retroactivity of *Griffin*, rather than

Miranda, be applied. So applied, the use of petitioner's silence against him warrants reversal (*O'Connor* v. *Ohio* (1966), 385 U.S. 92). To the extent the state has persuaded the Ninth Circuit to apply a different retroactivity rule, in *Wilson* v. *Madigan* (9 Cir. 1968), 389 F.2d 97, that decision misconceives the impact of *Griffin.*

On the merits, of course, the state advances no argument that the error was harmless. Nor, in fact, can it. Here petitioner's silence was used as a bludgeon, to obtain a conviction. Repeatedly it was brought to the attention of the jury, and repeatedly petitioner paid the price for it.

D. Identification Procedures; Right to Counsel.

Respondent asserts that immediately after each robbery, the descriptions given by the victims were communicated to Officer Nielsen, who eventually made an arrest of petitioner (Respondent's Brief, p. 44). But there was no evidence of this. At trial, the prosecutor asked Officer Nielsen, in general terms, if there had been any reports on the radio; however, he specifically instructed Nielsen not to state what had been heard in the way of descriptions or otherwise (A. 241). Thus, there was no evidence before the jury as to what descriptions the officer received. Had he in fact received the same descriptions as were contained in the on-the-scene reports prepared by the investigating officers, those descriptions would not have fit petitioner. None of them referred to a robber with a mustache, or chin whiskers (see P.X. 9, 11 and 13 for identification, A. 37-38). Only one, at the second liquor store, referred to a robber with a scar (P.X. 11 for identification). Further, the clothing described in each of the reports was so widely varied, that just about anyone in possession of a hat, or wearing

a shirt, sport coat and pants, would have qualified (P.X. 9 for identification: "dk. trousers, yell. plaid shirt, dk. spt jacket"; P.X. 11 for identification: "brn hat, drk. grey sport coat, dk trousers"; P.X. 13 for identification: "spt coat, brn & grey check, hat?").

Respondent contends, in effect, that the police were doing petitioner a service in taking him back to Pauletich for prompt identification (Respondent's Brief, p. 45). This immediate confrontation was not necessary. Had the police been truly interested in determining whether petitioner were the robber, all it would have taken was a telephone call to Pittsburg to find out where petitioner got his money (A. 248). But this was never done (A. 248). Further, at his arrest, petitioner specifically told Officer Nielsen that he was not the robber and that he had earned his money (A. 232, 248). He also said he was working and, apparently, that other people owed him money, which he could collect, if he needed it (A. 231, 233, 248).

Respondent intimates, at one point, that the clothing which has been removed and destroyed by the district attorney, as well as the diagram, likewise destroyed, were not actually before the jury (Respondent's Brief, p. 35, n. 4). This is not so. The prosecutor showed the clothing, in whole or in part, to nearly all his identification witnesses, as a principal ingredient of his case in chief (A. 63-64, 110, 129, 179, 194); and at the end of the prosecutor's case, as one of his last acts, all of the clothing was offered and received in evidence (A. 250). Further, the diagram was likewise received in evidence (A. 249). It was before the jury from the outset of the trial (A. 43-53). Moreover, during argument, the prosecutor specifically referred to the diagram on two occasions to show distances between

the stores (A. 270), even though the court had earlier forbade use of the diagram for this purpose (A. 46, 249).

What respondent's brief shows, if anything, is that the identification evidence was far from conclusive. One of the principal arguments advanced by respondent here, as by the prosecutor in the trial court on closing argument, is that it would be unreasonable to expect all the witnesses to agree on the clothing or other characteristics of the robber (Respondent's Brief, pp. 38, 46, 52; A. 293-294). But this uncertainty is precisely why the comment and instruction on the failure to testify were so harmful. Further, the very uncertainty shows why it was so important that the show-up and the line-up be free of undue suggestion, and it also demonstrates why the showing of photographs to the three witnesses who were least certain of an identification at the line-up, Jow, Griffith and Jones, was so highly prejudicial.

On the right to counsel issue, little need be said of respondent's assertions that petitioner was deliberately and knowingly "manipulating" the record for use on appeal (Respondent's Brief, p. 64). Had he been doing so, it is unlikely that he would have expressed himself, as he did, before the trial judge, or that he would have continually pressed his demands for counsel, after they had been first denied. Further, no request was ever made by petitioner for outside counsel until after the public defender had made two half-hearted attempts at arguing the motion for separate trials, and then deprecated petitioner when he attempted to raise the point himself (Tr. 7, 11-12, 14).

The issue of separate trials was not frivolous; it took five paragraphs of the Court of Appeal's original opinion

to dispose of the question (A. 317-318). Further, under California law, the trial judge plainly had the right to order the separate trials, "in the interests of justice and for good cause shown" (Pen. Code § 954).

It was only after petitioner saw what happened to this motion, and after the public defender had called him a "wise guy" in front of the judge (Tr. 18), that he became adamant in his refusal to be further represented by the public defender. In this he was not unreasonable. In fact, he was only asking for the minimum guaranteed by the Sixth Amendment:

> "Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer * * * " (opinion announcing the judgment of the Court, *Von Moltke* v. *Gillies* (1948), 332 U.S. 708, 725-726).

Little need be said of respondent's intimation that petitioner was likewise trying to "manipulate" the record on appeal when he made a request for counsel to brief and argue his case on each of the two remands (Respondent's Brief, p. 67). The court's own records showed that the original counsel had already been paid for his services (A. 324). Further, the court was now demanding prompt action from petitioner, and it knew that original counsel had taken over a year and a quarter to file a brief the first time (A. 316, 329). Had anyone shown the slightest interest in petitioner's request, or had a telephone call

been made to original counsel, it would have been discovered that counsel had withdrawn from the case. Certainly petitioner did everything he could to bring the matter to the attention of the court, and whatever may have been the merits of his request on the first remand, there was no excuse for not appointing counsel on the second remand. By that time, it was apparent petitioner had no one to speak for him.

As to respondent's contention that the letter by counsel, withdrawing from the case, may not be considered by the Court (Respondent's Brief, p. 67), suffice to say that such letter was plainly a part of the last petition for certiorari. It was here when the writ was issued; for that reason it is printed in the appendix (A. 323). The letter, of course, completely refutes the claim by respondent that petitioner still had counsel (A. 323).

E. All Issues Properly Before the Court.

Respondent attacks the precision with which petitioner, an indigent, has presented the issues in his various petitions for certiorari. Respondent contends that petitioner should have done a better job, and that this Court should therefore disregard the plain error shown in the record, as well as the issues raised by petitioner in the areas of his petitions outside the questions presented. This contention by respondent is plainly frivolous. The issues are in the record; they appear in the petitions. Respondent had no difficulty in identifying such issues as right to counsel, in filing its prior briefs in opposition to certiorari (Brief, No. 1210 Misc., O.T., 1964, pp. 2, 3-4, 5-8; Brief, No. 1358 Misc., O.T., 1967, pp. 5-6, 9-10). Also, the use of the line-up, the show-up, and the photographs

to obtain an identification were in the case from the beginning, and were always a part of petitioner's due process claims, to anyone who would look at the record. It would have been easier for petitioner, of course, if counsel had been appointed for him on either of the two remands. But he did the best he could. His petitions, though inarticulate, raised the issues, and the adoptive admissions, the line-up and the rest, are now properly here for decision (cf. *Pollard* v. *United States* (1957), 352 U.S. 354, 358-359; *Price* v. *Johnston* (1948), 334 U.S. 266, 292).*

Respectfully submitted,

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April 15, 1969

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* See, e.g., Petition, No. 1210, O.T., 1964 (counsel at trial, p. 7; comment on failure to testify, p. 13; adoptive admissions, p. 20 (implicit); general denial of due process throughout proceedings, pp. 6-1/4, 10); Petition, No. 889 Misc., O.T. 1966 (comment, harmless error, pp. 3-4; counsel on appeal, pp. 6-7); Petition, No. 1358 Misc., O.T., 1967 (comment, harmless error, pp. 3-4; counsel on appeal, p. 4; adoptive admissions, due process issues incorporated, p. 8); Supplement to Petition, No. 1358 Misc., O.T., 1967 (adoptive admissions, p. 6; comment on failure to testify, pp. 5, 6; general denial of due process throughout proceedings, pp. 6-7; manner in which evidence admitted, p. 10; improper methods used to obtain a conviction, p. 10); Reply, No. 1358 Misc., O.T., 1967 (counsel on remand, pp. 3-4; comment, harmless error, pp. 4-5); Supplement to Reply, No. 1358 Misc., O.T., 1967 (comment, harmless error, pp. 2-3).